No. 89-1332

In the Supreme Court of the United States

OCTOBER TERM, 1990

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

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Our central submission in this case is that the Immigration Reform and Control Act of 1986 (IRCA) precludes district courts from exercising general jurisdiction over "pattern and practice" allegations in the SAW program. Respondents and their amici dispute this proposition on three principal grounds. First, they contend that the opportunity Congress provided for judicial review of SAW denials—in the context of a deportation or exclusion order—is not adequate to address their claims and thus IRCA must be construed to permit those claims to be asserted in district court. They argue, next, that despite the broadly framed application of IRCA to any "determination respecting" an application, the language of the statute does not apply to *their* challenges, which are purportedly directed only at policies and practices affecting many applications. Finally, they contend that a variety of policy considerations support the allowance of pattern and practice cases in addition to the individual challenges to SAW denials that IRCA exclusively authorizes.

At bottom, these contentions rest on the view that the case-by-case system of review provided by IRCA is inadequate to serve the goal of litigating thousands of SAW applicants' claims in district court class actions. But the logic of respondents' arguments is not limited to "pattern and practice" claims. Rather, respondents' arguments, if accepted, would dictate a holding that the entire system of judicial review under IRCA is invalid; essentially the same hurdles to judicial review attacked by respondents apply to any individual who believes that his application was wrongfully denied. Whatever the merits of respondents' views as a policy matter—and we disagree with respondents on that point—Congress determined to put significant restrictions on the judicial review available to SAW applicants, and these restrictions are directly applicable here.

1. Respondents' principal contention (Br. 18-32) is that notwithstanding the explicit review process provided in 8 U.S.C. 1160(e), the statute must be construed to leave open district court "pattern and practice" actions. In their view, the courts of appeals cannot provide an adequate forum for raising their constitutional claims; therefore, district court jurisdiction is essential to avoid "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). That speculative contention should be rejected.

a. Respondents initially argue that the statutory opportunity for judicial review is inadequate because in order to obtain review, SAW applicants must be placed in deportation proceedings (and undergo any associated hardships of arrest and detention); moreover, since INS has prosecutorial discretion not to institute deportation proceedings, an applicant cannot be assured of obtaining judicial review at all. Br. 24-26. If respondents are correct that the deportation-order requirement as a prerequisite for judicial review renders "illusory" the opportunity for review (Br. 24, 32), any disappointed SAW applicant

—not just "pattern" plaintiffs—must be permitted immediately to file an action in district court. The alternative would be for the rejected applicant to present himself for deportation, await the outcome of that process, and seek review as provided in the statute—precisely the alternative available to class members here. The number of applicants affected by this case does not alter the nature of the claimed obstacles to obtaining review.[1]

This Court should not invalidate IRCA's entire framework for review on the basis of respondents' hypothetical claims of hardship. Respondents have not followed the route for judicial review provided by the statute and therefore are compelled to speculate about the adequacy of the statutory review process. Nothing in the record indicates how the process will actually work for aliens who wish to obtain deportation orders for the purpose of testing the denial of a legalization application. Cf. *Yakus* v. *United States*, 321 U.S. 414, 435 (1944). Although, as respondents state (Resp. Br. 25-26), it is theoretically possible that INS could prevent an alien from obtaining review under IRCA by declining to institute deportation proceedings, there is no indication INS has ever taken such an unusual step, and no reason to assume it will ever do so.[2] If INS were to prevent resort to the statutory

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[1] Indeed, respondents' position has implications for other provisions of the immigration laws, since judicial review of immigration claims is often deferred until entry of a deportation order. Cf. *Jain* v. *INS*, 612 F.2d 683, 689 (2d Cir. 1979) (rejecting a claim that an alien was "denied due process because he was unable to appeal the original denial of his section 245 application [for adjustment of status] and could only do so in the context of deportation proceedings"), cert. denied, 446 U.S. 937 (1980); *Kashani* v. *Nelson*, 793 F.2d 818, 826-827 (7th Cir.) (requiring rejected asylum applicant to renew his asylum claim in deportation proceedings before seeking judicial review), cert. denied, 479 U.S. 1006 (1986).

[2] Nor is work authorization categorically unavailable to an alien desiring to be put in deportation proceedings in order to test a legalization denial. See Resp. Br. 26. Although an alien whose SAW application is finally denied will lose the mandatory work authorization afforded by IRCA, see 8 U.S.C. 1160(d)(2), an

forum for review by refusing to initiate deportation proceedings, the time would then be ripe to consider whether IRCA's system for review, on the particular facts, deprived an alien of an adequate opportunity for judicial review, and, if so, whether that deprivation was unconstitutional. No such claim is presented here.

Contrary to respondents' contention, *Rusk* v. *Cort*, 369 U.S. 367 (1962), does not support the conclusion that the perceived obstacles to review under IRCA require immediate judicial review in district court. Resp. Br. 25; see also AFL Amicus Br. 23. The Court in *Rusk* held that the procedures of 8 U.S.C. 1503(b) and (c) (which permitted a person living overseas and claiming United States citizenship to obtain a certificate of identity, travel to the United States, and present his citizenship claim in INS exclusion proceedings) were not exclusive; thus, a person who remained abroad could bring a declaratory judgment action to challenge an administrative ruling divesting him of citizenship. 369 U.S. at 379. The Court's holding was not based on the possible hardship to an individual seeking to establish his citizenship through the statutory process; rather, the decision responded to the permissive language of the statute, which stated that a person "'*may*' apply for a certificate of identity and that a holder of a certificate of identity '*may*' apply for admission to the United States." The Court explained that those provisions "show[] no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c)." *Rusk*, 369 U.S. at 375. IRCA, in contrast, *requires* that review take place only under 8 U.S.C. 1105a after the entry of an appropriate order.[3]

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alien placed in deportation or exclusion proceedings can request INS to exercise its discretion to grant temporary work authorization. 8 C.F.R. 274a.12(c)(13). Although INS is not required to provide work authorization in that setting, the existing regulations provide avenues for aliens to seek relief.

[3] Moreover, the holding in *Rusk* was supported by the fact that the purpose of 8 U.S.C. 1503(b) and (c) was to prevent a person

In evaluating respondents' objections to IRCA's deportation-order requirement, it is critical to understand the legal context in which Congress acted. The requirement that judicial review be limited to SAW applicants confronted with a deportation or exclusion order was adopted in response to an "extremely complex" problem: "[H]ow to offer millions of people an unprecedented benefit, guarantee confidentiality to induce them to apply for that benefit, turn the process over to an overburdened agency and avoid filling the federal courts with thousands of appeals."[4] Congress's resolution of that problem reflects the underlying tension between IRCA's two principal objectives: to offer legalization to the large population of illegal aliens who have lived in the United States for many years and who have put down deep roots in our society, but to curtail illegal immigration into the United States by removing incentives for illegal aliens to be here. H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 45-49, 56-58, 71-72 (1986). To discourage illegal aliens from coming to this country, Congress imposed sanctions on employers who hire aliens lacking proper authorization to work. See 8 U.S.C. 1324a; H.R. Rep. No. 682, *supra*, Pt. 1, at 46, 56. And, although not specifically aimed at illegal aliens already present in this country, the inevitable effect of the employer sanctions program was to make it more difficult

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from entering the United States under a false claim of citizenship and then "disappear[ing] into the general populace"; that congressional purpose had no application to a person willing to remain outside the United States while his citizenship was determined. 369 U.S. at 377-379. Here, in contrast, Congress's purposes in limiting judicial review would plainly be frustrated if aliens could circumvent Section 1160(e) by claiming that they would experience undue hardship if forced to obtain a deportation order before seeking judicial review.

[4] Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives To Get Into Court?*, 25 Harv. C.R.-C.L. L. Rev. 53, 68-69 (1990) (footnote omitted).

for illegal aliens who did not qualify for legalization to continue living illegally in the United States.[5]

Against that background, the requirement much criticized by respondents—that an alien desiring judicial review of his legalization denial must invite entry of a deportation order—"simply mirrors the duality of purpose that runs all through IRCA."

> IRCA's aim was not to maximize the range of legal opportunities open to undocumented aliens. Instead, its major objective is best understood as bringing an end to the ongoing limbo of undocumented status—in one of two ways. Those who qualify for legalization are invited to surface and become legal, fully functioning members of the society. Those who do not qualify are essentially told to leave, because the U.S. is going to get serious about enforcement of immigration laws. The principal manifestation of that seriousness is of course employer sanctions, which are meant to dry up job opportunities for those illegally in the country, ultimately persuading them to return to their homelands voluntarily. * * * Congress's message for the undocumented population is abundantly clear in the basic design of the legislation: Legalize or leave.

Martin, *Judicial Review of Legalization Denials*, 65 Interpreter Releases (Federal Publications) 757, 760 (Aug. 1, 1988) (footnotes omitted). Senator Simpson, a chief sponsor of the immigration reform bill, underscored that "message" of IRCA: "This is a generous Nation responding; instead of going hunting for you and going through

[5] The employer-sanctions program applied prospectively; it did not bar the "continuing employment of an alien who was hired before the date of the enactment of [IRCA]." Pub. L. No. 99-603, § 101(a)(3), 100 Stat. 3372 (1986), set forth at 8 U.S.C. 1324a note. But the sanctions did apply to any new employment, thus making it unlawful for an illegal alien to change jobs. Consequently, the employer sanctions program operated "to discourage illegal immigration into the United States and to make it difficult for undocumented aliens to remain in the country." *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1326 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018.

the anguish of that in the cities and communities of America, this is it. It is one time. You either show up on this one or you will be rejected by the employers because employer sanctions will be in place. Your choice then is to return to wherever you come from * * *." 132 Cong. Rec. 33,218 (1986).[6]

The obstacles of the deportation process for the class members here are thus inherent in the legalization program Congress devised. Of course, Congress could have chosen to make judicial review available sooner, or could have removed the need for an alien to expose his illegal status in order to obtain judicial review of his claim. But to do so, Congress would have had to strike a different balance among its competing immigration policies: to grant legalized status to qualified illegal aliens; to make illegal immigration highly unattractive to illegal aliens; and to provide a fair but limited opportunity for judicial review. Enlarging the range of options for judicial review for the reasons adduced by respondents is fundamentally incompatible with the careful reconciliation of policies effected by Congress.[7]

[6] The confidentiality protections afforded to SAW applicants must be understood in the same light. In order to encourage participation in the SAW program, Congress protected applicants against having their SAW applications used for any purpose other to make a determination on the application (or to enforce the prohibition against filing fraudulent applications). But Congress chose not to extend that protection to a rejected applicant seeking judicial review. Compare 8 U.S.C. 1160(b)(6) with 8 U.S.C. 1160(e)(3)(A). Accordingly, the requirement that an alien give up his anonymity to challenge an INS determination in court is not a reason to interpret the statute to provide some safer means of judicial review (see AFL Amicus Br. 18-20); Congress never intended to cloak judicial review with confidentiality.

[7] Respondents' amici argue that under our approach, aliens who were wrongly prevented by INS or a Qualified Designated Entity from even filing an application would be completely precluded from judicial review because they would never obtain the requisite "denial" of a legalization application. The Farm Labor Alliance *et al.* Amici Br. 15, 19; AFL Amicus Br. 28. As the AFL brief

b. Respondents also contend that their due process claims could not be addressed in the deportation context because the administrative review mechanisms provided under IRCA would not create a sufficient record for the court of appeals. Resp. Br. 27-32; see ABA Amicus Br. 4-6. But both the district court and the court of appeals in this case discussed the need for translators, witnesses, and particularized records of denials at SAW interviews without adverting to any item of evidence that would have been unavailable in a proceeding under Section 1105a. Pet. App. 14a-17a, 49a-52a. The analysis in those opinions demonstrates that constitutional adjudication under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), does not invariably necessitate district court jurisdiction. The *Mathews* factors often can be determined and weighed based on such "legislative facts" as publicly available information about an agency's functions and purposes, its budget constraints, its methods of operation, and the nature of the alternative procedures sought.[8]

Even if a court of appeals found it necessary to amplify a record in order to adjudicate a constitutional

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notes (at 28), that issue does not arise in this case because the class certified includes only aliens "who have applied for, or will apply for," SAW status. Pet. App. 48a. But we see no reason why such a rebuffed applicant could not litigate a claim, in a proceeding to review a deportation order, that he had been improperly thwarted in his effort to apply for legalized status. Cf. *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (allowing review of "all matters on which the validity of the final order is contingent").

[8] In *Mathews* itself, for example, the case was decided in the lower courts on a motion to dismiss the complaint, and no federal court evidentiary hearing had been held prior to this Court's decision. 424 U.S. at 325-326. Nonetheless, this Court was able to resolve the question presented (whether due process required an evidentiary hearing prior to the termination of disability benefits) by considering a variety of materials describing the operations of the Social Security disability program. *Id.* at 332-349. See also *Califano* v. *Yamasaki*, 442 U.S. 682, 696-697 (1979). A similar approach could readily be employed in evaluating respondents' challenges.

claim, it could accomplish that goal in several ways in full compliance with IRCA. The provision for judicial review under IRCA incorporates 8 U.S.C. 1105a, which makes applicable to the review of deportation orders "[t]he procedure prescribed by, and all the provisions of" the Administrative Orders Review Act,[9] better known as the Hobbs Act. That Act authorizes a court of appeals either to require an agency to reopen its proceedings to take additional evidence, 28 U.S.C. 2347(c),[10] or to transfer proceedings to a district court if an administrative hearing is not required by law and a genuine issue of material fact is presented; such district court proceedings are governed by the Federal Rules of Civil Procedure. 28 U.S.C. 2347(b)(3). Cf. *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 320 (1953). Respondents fail to explain why these alternatives would not generate an adequate record for review of their due process claims.

c. Respondents further contend (Br. 19-22, 41-45) that the organizational plaintiffs must be permitted to sue on broad "pattern" theories because they otherwise would have no means of gaining access to court. See also AFL Amicus Br. 26-28. As our opening brief explained (at 23-26), recognizing such suits would quickly destroy the limited framework for review established by Congress; hence, judicial review at the behest of those or-

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[9] Pub. L. No. 89-554, 80 Stat. 622 (1966), codified at 28 U.S.C. 2341 *et seq.*

[10] Although courts have differed on the applicability of Section 2347(c) to appellate review of deportation orders, compare *Becerra-Jiminez* v. *INS*, 829 F.2d 996, 1001 (10th Cir. 1987), with *Ramirez-Gonzales* v. *INS*, 695 F.2d 1208, 1213 (9th Cir. 1983), a remand would not be inconsistent with IRCA. While 8 U.S.C. 1160(e)(3)(B) limits judicial review to the record established by INS's administrative appeals unit, that unit may supplement the record with "such additional or newly discovered evidence as may not have been available at the time of the [initial] determination." 8 U.S.C. 1160(e)(2)(B). Cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

ganizations is "impliedly precluded." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

Respondents' effort to justify organizational suits only confirms that litigation by those plaintiffs disrupts the statutory scheme under IRCA, while preclusion of organizational suits "will not threaten realization of the fundamental objectives of the statute." *Block*, 467 U.S. at 352. Of the variety of institutional interests asserted by the organizational respondents in this case, conspicuously absent is any contention that INS violated *their* due process or statutory rights. See Resp. Br. 10-11 (alleging injuries of loss of reimbursed application fees; depletion of a "reservoir of goodwill and trust"; "internal friction"; "diversion of * * * limited resources"). Rather, the legal claim of the organizational respondents hinges entirely on the theory that the due process rights of *SAW applicants* have been violated. Those rights, however, can be protected through litigation brought by the rejected SAW applicants themselves in the manner that Congress intended.[11] Preclusion of organizational suits will not insulate any constitutional claims from review; but entertaining those claims at the instance of organizational plaintiffs short-circuits and undermines the administrative process that Congress contemplated. See *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325, 1332, 1340 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018.[12]

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[11] The organizational respondents also claim the right to sue as representatives of aliens who have not even applied for SAW status; in respondents' view, such aliens could proceed directly to court without pursuing the administrative process at all. Br. 43 n.36. But those "future" applicants cannot circumvent the administrative process by seeking advisory judicial opinions on questions of law; they too are required to comply with statutory prerequisites for review. *Heckler* v. *Ringer*, 466 U.S. 602, 620-625 (1984).

[12] While respondents seek to dramatize the harm to Qualified Designated Entities (QDEs) (Br. 41) (claiming that the QDEs' "credibility, and thus their effectiveness, was undermined by INS

The argument advanced by amici State of California, *et al.*, illustrates the danger of entertaining "pattern" suits based on alleged injuries-in-fact experienced by entities not subject to deportation or exclusion. California argues (Amici Br. 6-7) that state and local governments "have even greater interests in the proper administration of the SAW program than the organizational Respondents herein"; thus, according to California, such governments must be permitted to sue to complain about alleged unconstitutional actions taken by INS with respect to SAW applicants. Indeed, if Qualified Designated Entities can sue on the basis of the revenue lost because of the SAW applicants whom they turn away (see Resp. Br. 10-11), why should not a State be entitled to bring a similar suit if it will have to bear some expenses as the result of the denial of SAW applications? Why not an employer who claims to have lost access to a pool of qualified labor? Those claims have the same analytical underpinnings as the organizational respondents' claims; but if they are recognized, IRCA's limitations on judicial review will soon collapse under a wide array of claims by non-aliens.

2. Not only do respondents fail to establish that review of their claims is unavailable as a practical matter under 8 U.S.C. 1160(e)(3), they also fail to overcome the text of IRCA, which expressly precludes district court jurisdiction over this action. As explained in our opening

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conduct which rendered their advice and counsel worthless"), they offer no evidence that Congress intended QDEs to be omniscient advisers, rather than counselors about INS's policies. IRCA itself suggests the latter, more modest role. The QDEs were expressly precluded from making determinations required to be made by the Attorney General, 8 U.S.C. 1160(b)(4), and cooperative agreements between INS and the QDEs required them to "comply with all relevant INS regulations relating to the legalization . . . programs." *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d at 1339. There is no reason why requiring QDEs to transmit accurate advice about INS's policies (as well as permitting QDEs to provide independent advice about the validity of those policies) interferes with the function of QDEs under the statute.

brief (at 17-22), IRCA provides that "[t]here shall be *no* administrative or judicial review of *a determination respecting an application* for adjustment of status under this section except in accordance with this subsection"; the subsection then authorizes judicial review of SAW denials exclusively in the review of an exclusion or deportation order. 8 U.S.C. 1160(e)(1) and (e)(3)(A) (emphasis added). Respondents and their amici seek to avoid this bar by contending that the statutory language does not apply to "pattern and practice" cases. Resp. Br. 32-33; AFL Amicus Br. 5-11; ABA Amicus Br. 7-9. Contrary to respondents' contention, the language of IRCA does not cease to apply whenever the reasons underlying the denial of a SAW application can be characterized as a general policy or agency practice.

A natural reading of IRCA's preclusion provision covers claims that an unconstitutional policy or procedure has been applied in adjudicating an application—precisely the type of claim advanced here.[13] For example, if INS's policy of failing to pay for an interpreter resulted in the denial of SAW status, then the policy's application to a particular applicant would constitute a "determination respecting" an application. Further, a

[13] Although respondents disclaim the intention of seeking reversal (or even review) of any particular claim (*e.g.*, Br. 12-13, 18-19, 21-22, 33), the district court plainly understood otherwise, as it ordered the reopening of thousands of such claims. Pet. App. 56a. Of course, the vacation of a denial, the reopening of a claim, and the requirement of additional agency proceedings constitutes "reversal" of the agency's determination. Cf. *Sullivan* v. *Finklestein*, 110 S. Ct. 2658, 2664 (1990). Indeed, it is inescapable that respondents sought to challenge individual denials; the "irreparable harm" alleged to justify preliminary injunctive relief was based on those very denials. Resp. Br. 22. And respondents cannot avoid the jurisdictional implications of those reversals by pointing out that INS did not specifically appeal those reopenings. Contrary to respondents' view (Br. 7 n.4, 22 n.8), we did challenge the jurisdiction of the district court over the entire case, not just the paragraphs of the injunction under appeal. See Gov't C.A. Br. 14; Gov't C.A. Reply Br. 2.

court of appeals, in the review of a deportation order, could evaluate the constitutionality of the INS policy in the course of reviewing the particular decision before it. That approach to judicial review accords with fundamental principles of administrative law. Under the Administrative Procedure Act, subsidiary questions of law that support agency action are reviewable together with the ultimate determination. See 5 U.S.C. 704; S. Doc. No. 248, 79th Cong. 2d Sess. 255 (1946) (agency action "includes the supporting procedures, findings, conclusions, or statements of reasons or basis for the action"). The same principles guide judicial review in immigration cases. See *Foti* v. *INS*, 375 U.S. 217, 229 (1963) (court of appeals' jurisdiction under 8 U.S.C. 1105a includes "all determinations made during and incident to the administrative proceeding"); *INS* v. *Chadha*, 462 U.S. 919, 938 (1983). As a general matter in entitlement programs, courts determine the validity of agency rules of broad application in the course of reviewing particular claims. See, *e.g.*, *Heckler* v. *Campbell*, 461 U.S. 458, 465 (1983) (Social Security Act); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988) (Black Lung Benefits Act). Policies and rules under IRCA are reviewable in a similar fashion.[14]

[14] Respondents rely heavily (Br. 19) on *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), to suggest that limits on review of "determinations" do not apply to "procedures," but they fail to respond to our argument that *Michigan Academy*'s reading of the statute at issue was driven by the need to ensure *some* judicial forum for constitutional claims arising under Part B of the Medicare Program (see *id.* at 681 n.12; Gov't Br. 22). Moreover, *Michigan Academy* is inapposite for the additional reason that the language construed in that case (a "determination *of* the amount of benefits") is far narrower than IRCA's coverage of a "determination *respecting* an application." Nor do respondents succeed in distinguishing *Heckler* v. *Ringer*, 466 U.S. 602, 614 (1984), where, in considering a claim analogous to respondents' claims, the Court characterized "objections to the Secretary's 'procedure' for reaching her decision" as "'inextricably intertwined' with respondents' claims for benefits" and therefore

Accordingly, IRCA's use of the singular form to describe the INS decisions governed by its restrictions on judicial review ("a determination"; "an application"; "such a denial") does not suggest that Congress somehow intended to exempt challenges to program-wide policies from limitations on review. See Resp. Br. 33; AFL Amicus Br. 5-6. General policies, when applied in particular cases, are "determination[s] respecting" an application (see *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d at 1331); review of them is therefore limited and channelled by IRCA. The use of singular terms in the statute is in keeping with Congress's intent to require judicial review on a case-by-case basis, rather than at the "program" level.[15]

Respondents also argue that because several lower courts have construed the general immigration provision governing review of deportation orders (8 U.S.C. 1105a) not to preclude "practice[] and procedure[]" cases, Congress necessarily adopted that interpretation of the law

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required to "be channeled first into the administrative process which Congress has provided." Respondents are simply wrong in stating that *Ringer* has been treated as dealing only with review of an "amount determination." Br. 19-20, citing *Michigan Academy*, 476 U.S. at 677 n.7. In the *Michigan Academy* footnote cited by respondents, the Court addressed only "the fourth footnote in *Heckler* v. *Ringer*" (which dealt with Part B of the Medicare Program), not the balance of the opinion (which dealt with Part A) on which we rely.

[15] Despite respondents' extensive discussion (Br. 45-49) of the legislative history, they provide no direct evidence that the purpose behind Section 1160(e) was *solely* to restrict judicial review of individual claims in order to prevent hundreds of disappointed applicants from flooding the federal courts. The House Report does not say this. It states that the proposed bill "[p]ermits judicial review of such denial *only* within the context of the review of an order of deportation." H.R. Rep. No. 682, *supra*, Pt. 1, at 96 (emphasis added). The background from which this provision emerged —one in which the competing Senate bill precluded judicial review in any form—suggests that Congress understood that it was authorizing this limited type of review and none other. Gov't Br. 15-17.

when it made Section 1105a applicable to the review of SAW denials. Resp. Br. 34-35 & n.23;[16] AFL Amicus Br. 9-10. As an initial matter, respondents are mistaken in claiming (Br. 35) "direct evidence that Congress knew of and endorsed procedural and policy challenges, such as those here." The fragment of legislative debate cited by respondents (Br. 35 n.23) relates to a provision that applied to asylum (not SAW) applications and that was never enacted by Congress. The colloquy reflects, at best, the beliefs of two individual Senators about proposed language that differed sharply from that employed in IRCA itself. More fundamentally, although Congress is presumed to adopt prevailing interpretations of existing statutes when it incorporates prior provisions without change, *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985), that presumption does not apply here. First, IRCA provides that there shall be judicial review *"under* section 1105a" (emphasis added); that formulation does not authorize review pursuant to judicially created *exceptions* to that provision. Second, even if Section 1105a allows exceptions, IRCA goes farther and expressly bars any other forms of review. 8 U.S.C. 1160(e)(1). Accordingly, IRCA itself precludes extension to the legalization context of the debatable "pattern and practice" decisions under Section 1105a.

3. Finally, respondents rely (Br. 38-41) on various policy considerations that are said to demonstrate the wisdom and efficiency of allowing wholesale pattern or practice challenges. These policy arguments are essentially premised on the idea that district court class actions will enable more aliens to achieve legalization, thus promoting Congress's goal of providing a "generous program." Resp. Br. 39, quoting H.R. Rep. No. 682, *supra*,

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[16] Respondents place (Br. 34-35) particular emphasis on 8 U.S.C. 1329 (a general jurisdictional provision under the immigration laws), but they do not explain why this provision is any more relevant than 28 U.S.C. 1331, on which the "pattern and practice" cases principally relied. See Gov't Br. 27.

Pt. 1, at 49. But it is not the case that any interpretation of the statute that furthers the goal of increasing participation in the legalization program serves Congress's purposes. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). In this case, empowering the district courts to supervise INS procedures under the guise of "pattern and practice" suits entails costs both for the sound development and application of immigration policy and for the workload of the federal courts—costs that Congress did not authorize.

Wide-ranging district court actions, in which the courts exert their claimed power of review to arrogate to themselves large parts of the administration of the legalization effort, have been neither efficient, beneficial, nor consistent with the congressional purpose. Even though some objections raised in those cases have been valid ones, the net effect of litigation under IRCA has been to impose a virtual receivership on INS operations, with federal judges overseeing the process; that consequence is vividly illustrated by the discussion of cases in The Farm Labor Alliance *et al.* Amici Brief. See also Gov't Br. 30-31. As in other contexts, "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program * * * are not unlimited." *Mathews*, 424 U.S. at 348.

In contrast, the approach required under IRCA focuses review on particular cases. Under IRCA's regime, legal questions can be considered without converting district courts into INS administrators. Respondents and their amici repeatedly assert that IRCA, if construed as we

suggest, will deluge the courts of appeals with thousands of legalization cases that could be resolved more efficiently in district court class actions. Resp. Br. 41; AFL Amicus Br. 11-17; ABA Amicus Br. 10-16. That suggestion, not borne out by experience, is entirely chimerical. The approach Congress required—of confining challenges to individual orders of deportation or exclusion—does not require numerous individual appeals to establish a proposition of law affecting thousands of applicants. INS, like other federal agencies, appreciates the value of test cases on issues of law. If a court of appeals decides an issue adversely to INS, and the Solicitor General determines not to seek further review, the agency is prepared to acquiesce in that decision on a circuit-wide basis. Indeed, if it is determined that INS does not intend to seek contrary rulings in other circuits in order to facilitate review by this Court, INS is prepared to acquiesce in adverse rulings nationwide.[17]

Respondents urge that their "pattern" cases are efficient because they encompass "broad policies or practices applicable to all cases" (Br. 34) including future applications not even filed (*id.* at 6). But those contentions, if credited, only highlight the similarity between respondents' approach to reviewing agency action and the approach to reviewing an agency "program" that the Court rejected last Term in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3191 (1990).[18]

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[17] An example of this process is the recent decision in *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990). There, the court of appeals reversed the denial of a legalization application on the basis that INS's Legalization Appeals Unit had committed legal error in holding that an alien whose plea of guilty was subject to "deferred adjudication" had been "convicted of any felony" under 8 U.S.C. 1255a(a)(4)(B). INS has advised us that it will not seek authorization for further review of this ruling, and that it will, sua sponte, have the Legalization Appeals Unit reopen its appellate cases, nationwide, in which denials were based on the same issue of law.

[18] Contrary to respondents' contention (Br. 37 n.26), our reliance on *Lujan* (a case not decided when the Court granted the

Respondents struggle to distinguish *Lujan* by asserting that the "procedures, policies, and practices challenged here * * * are described with precision and particularity." Br. 38 n.28. But the point of *Lujan* was not that general policies may lack sufficient specificity to enable review; rather, the point is that across-the-board policy challenges—no matter how specifically "described" —are not reviewable in the abstract, before those policies are applied in particular cases. Even a regulation (perhaps the paradigm of a specifically described policy) "is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, 110 S. Ct. at 3190. As in *Lujan*, respondents find this "case-by-case approach * * * understandably frustrating." *Id.* at 3191. Nevertheless, Congress did not authorize district court review of free-floating INS policies disconnected from their application in a particular proceeding. In an individual case, a court can better discern the practical implications of an INS policy—as well as the specific impact of that policy on the rejection of a particular claim. That ensures that courts will set aside agency action only for those errors that actually work prejudice to an applicant. If individual SAW applicants wish to challenge their legalization denials—and the policies that support those determina-

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petition here) is not beyond the scope of the question presented in this case. *Lujan* underscores our statutory argument because it indicates that even absent IRCA's preclusion provision, respondents' claims (if treated as challenging policies independent of particular determinations) would be unreviewable. It makes little sense to construe a statute to permit APA review of asserted "agency action" when conventional administrative law principles establish that the challenged agency action is unreviewable in the first place.

tions—they must adhere to the system for review that Congress has provided.

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For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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